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MALICIOUS PROSECUTION, FALSE IMPRISONMENT AND DEFAMATION

1. Consistency of Policy in Protection of Interests

The remark has occasionally been made that there is nothing that can accurately be called a "law of tort" in the sense of a systematic and logically coherent body of legal principles which disclose a consistent policy in the protection of those interests which it is the function of tort law to protect.¹ This is partly or at least superficially true. Certainly legal literature does not reveal that quantity of analysis and systematic development of legal conceptions in the field of tort that has characterized the development of the law of contract. This may, in part, be explained by the somewhat checkered history of tort law, as compared with that of contract law. The diverse origins of the various "torts,"² and the tardy ripening of the idea of negligence as a source of liability,³ together with the

¹"For Sir John Salmond there was no English law of tort; there was merely an English law of torts, that is, a list of acts and omissions which, in certain conditions, were actionable." STALLYBRASS, in SALMOND ON TORTS (8th ed. 1934) 17.

²See WINFIELD, LAW OF TORTS (1931) 8-31.

³"Sir John Salmond did not accept the view that negligence was ever a purely objective fact involving no characteristic or essential mental attitude at all. Nor does he appear to have thought that negligence had developed into a specific tort, but regarded it merely as a state of mind providing the essential condition of liability for recognized torts. There seems, however, to be abundant authority to show that our Judges now recognize the existence of an 'action of negligence'." STALLYBRASS, in SALMOND ON TORTS 453.

"Is negligence an independent tort, or is it merely one of the modes in which it is possible to commit most torts?" This question was the subject of an extended discussion by an eminent legal historian, as late as 1926. See Winfield, *The History of Negligence in the Law of Tort* (1926) 42 L. Q. REV. 184.

Indeed, in 1934, the House of Lords settled the question in England that a breach of statutory duty gives rise to an action for negligence,

difficulties of rationalizing the several liabilities without fault⁴ are obvious impediments to the growth of a uniform and logical structure. What is perhaps more important, the wide range of interests that are protected by tort law and the varying shades of protection required therefor indicate a slow growth of the rational side of this branch of law as compared with the almost unitary interest protected by the law of contracts. Whereas the latter is concerned with the shaping of a consistent policy to protect the interest in the security of promised advantages, the former must work out adequate protection for the interests in bodily security and freedom, security of property, reputation, privacy, marital and other domestic relations, mental and emotional interests, pecuniary interests connected with transactions and trade and business generally.

These interests cover almost every phase of human activity, and the extent of protection required varies with this activity and with the pressure of the competing interests with which a balance must be maintained. The shaping of a policy to adjust these manifold interests requires many rules of graduated severity. As the one interest overbalances the opposing interest, the conditions to liability must be tightened. The process of evaluating and appraising interests is thus, in tort law, an extremely, indeed almost incredibly complicated one.

It is hardly to be expected that in such a field, where some interests are protected by one type of action, constituting principles of substantive law called a "tort," and another interest by some different action, perhaps alien in origin, a

Lochgelly Iron & Coal Co. v. M'Mullan (1934) A.C. 1. It is to be noted, however, that this has for years been settled by American courts. See, e.g., the remarkable opinion by Judge Mitchell of the Supreme Court of Minnesota, in 1889: "Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. In either case, the failure to perform the duty constitutes negligence, and renders the party liable for injuries resulting from it." *Osborne v. McMasters*, 40 Minn. 103, 41 N.W. 543, 12 Am.St.Rep. 698 (1889).

⁴Cf. Professor Bohlen's treatment of the rule in *Rylands v. Fletcher*, Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. OF PA. L. REV. 298; BOHLEN, *STUDIES IN TORTS* (1926) 344, with that of Sir John Salmond, regarding it as a part of the law of Nuisance, SALMOND ON TORTS (7th ed. 1928) as to which see Winfield, *Nuisance as a Tort* (1931) 4 CAMB. L. J. 195 and the discussion by STALLYBRASS in SALMOND ON TORTS 595-596.

consistent policy would be found. Still more surprising would this appear, when it is noted that some interests are protected by two or even more actions. Discrepancies have been discovered and criticized.⁵ However, the extent of such inconsistencies can only be discovered by investigations which analyze and compare rules of law the function of which is to protect the same or similar interests, which note the distinctions in liability, and which seek to ascertain whether they are justified by a proper appraisal of the interests involved in the situations thus disclosed. Presumably, such investigations will tend to indicate whether a consistent policy underlies the rules of tort law applicable to similar and analogous fact situations. Whether a "law of tort" exists or only a number of more or less unrelated "torts" making effective inconsistent policies can be determined only by some such method.

In the present study, an examination of three "actions" which serve the same interests throws light on the matter. Strange indeed that it should develop that three totally distinct torts are, in the main and for the most part in minute detail, rationally consistent and practically effective to enforce a policy that is uniform at points of identity of interest values and yet sufficiently elastic adequately to strengthen protection as these values increase. In some respects, these rules overlap, but do so with amazing accuracy; in other respects, they are complimentary, one terminating where another begins. The net results provide at least a partial answer to the charge that the hit and miss technique of the common law is inadequate to provide an understandable and coherent "law of tort."

2. *Overlapping of Interest Protection in Three Actions of Tort*

To state that the action of malicious prosecution affords protection to the interest in freedom from unjustifiable litigation is to state a rather obvious truth in terms which constitute a rather glaring defect of analysis. Perhaps it is not so much an error of analysis as a lack of it. It is to describe the interest protected in terms of the harm which constitutes

⁵Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415.

the invasion of the interest. It does little more than to state the means by which the invasion is accomplished, and is thus a negative form of statement. Any interest may be so described, but to do so adds little to the understanding of tort law and does not obtain the advantages which analysis of the law in terms of interests is supposed to afford. The harm—in this case the unjustifiable litigation—indicates the extent to which some interest or interests receive legal protection. To make possible an intelligent appraisal of rules of law in terms of their social and economic function, the interest invaded should be described with accuracy and precision.

There are in fact several interests protected by the action for malicious prosecution. "The interest of personality may be involved, *i.e.*, the integrity of the person; also not infrequently, plaintiff's interests in relation with others (honor, reputation, free speech, business relations) are involved in such suits; and now and then a property interest."⁶ As early as 1700, Lord Holt said that the action of malicious prosecution could be based upon three sorts of damage: "(1) The damage to a man's fame, as if the matter whereof he is accused be scandalous. . . . (2) The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action, . . . (3) The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses is without doubt, which is an injury to his property; and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself."⁷ Thus, there are at least three important interests which receive protection, the interest in reputation, the interest in bodily freedom, and a financial interest.⁸

⁶GREEN, JUDGE AND JURY (1930) 337.

⁷Savile v. Roberts, 1 Raym.Ld. 374, 378 (K.B. 1698).

⁸In an action for malicious prosecution, damages are allowed for *arrest* and *imprisonment* if the plaintiff has been subjected thereto. Rich v. Rogers, 250 Mass. 537, 146 N.E. 246, 37 A.L.R. 656 (1925); Garrison v. Pearce, 3 E. D. Smith 255 (N.Y. 1854); Black v. Canadian P. Ry., 218 Fed. 239 (W.D.N.Y. 1914), *aff'd*, 230 Fed. 798 (C.C.A. 2d, 1916);

There has been some confusion in the recognition given to these various interests in the law of malicious prosecution. Formerly, at least in some states, the action could not be maintained unless there was an arrest made.⁹ The proceeding had not been "instituted" within the formula for malicious prosecution until the service of process. In most states, however, an arrest or imprisonment is unnecessary. The proceeding is instituted when process is issued.¹⁰ As a matter of practical administration there must be some point at which it can be said a criminal proceeding has been begun—some official action that can afford a certain rule of thumb. The issuance of process affords this certainty and consequential ease of administration, and at the same time affords protection against conduct which may seriously affect the reputation although in no other way invading the interests of the accused. Under the minority rule, the interest in reputation is not protected by the action of malicious prosecution until the interest in bodily freedom had also been invaded.¹¹

But the interest in bodily freedom and reputation are protected by other actions, as well, viz., the action for a false arrest and the action for defamation. To be sure, there is, strictly speaking no tort of "false arrest." It is, however, a

Stoecker v. Nathanson, 5 Neb. Unoff. 435, 98 N.W. 1061, 70 L.R.A. 667 (1904). So, too, damages may be obtained for *loss of reputation*. *Barnes v. Culver*, 192 Ky. 10, 232 S.W. 39 (1921); *Bernstein v. Simon*, 77 Colo. 193, 235 Pac. 375 (1925). And *pecuniary loss* by the prosecution or the resulting imprisonment or loss of reputation. *Blunk v. Atchison, T. & S. F. R. R.*, 38 Fed. 311 (C.C.W.D. Mo. 1889); *Wheeler v. Hanson*, 161 Mass. 370, 37 N.E. 382, 42 Am.St.Rep. 408 (1894); *Harr v. Ward*, 73 Ark. 437, 84 S.W. 496 (1904); *Seidler v. Burns*, 86 Conn. 249, 85 Atl. 369, Ann.Cas. 1916C 266 (1912); *Barnett v. Reed*, 51 Pa. 190, 88 Am. Dec. 574 (1865); *Stoecker v. Nathanson*, 5 Neb. Unoff. 435, 98 N.W. 1061, 70 L.R.A. 667 (1904); *H. S. Leyman & Co. v. Short*, 214 Ky. 272, 283 S.W. 96 (1926).

⁹*Heyward v. Cuthbert*, 4 McCord 354 (S.C. 1827); *Cooper v. Armour*, 42 Fed. 215, 8 L.R.A. 47 (C.C.N.D.N.Y. 1890); *Davis v. Sanders*, 133 Ala. 275, 32 So. 499 (1901).

¹⁰*Halberstadt v. New York Life Ins. Co.*, 194 N.Y. 1, 86 N.E. 801, 21 L.R.A. (N.S.) 293 (1909); *Coffey v. Myers*, 84 Ind. 105 (1882); *Holmes v. Johnson*, 44 N.C. 44 (1852); *Olson v. Haggerty*, 69 Wash. 48, 124 Pac. 145 (1912); *Ballard v. Cash*, 191 Ky. 312, 230 S.W. 48 (1921).

¹¹In *Cooper v. Armour*, 42 Fed. 215, 216 (C.C.N.D.N.Y. 1890), the court ascribed as the reason for its holding: "The only injury sustained by the person accused, when he is not taken into custody, and no process has been issued against him, is to his reputation; and for such an injury

popular and convenient expression to indicate that an arrest was not lawful, and, therefore, whatever harm has been done to the plaintiff not privileged. The harm will almost invariably be imprisonment and often assault and battery, if not all three.¹² The plaintiff complains of the trespasses to his person and the defendant pleads the privilege of a lawful arrest. The arrest being found "false," the defense fails and the defendant is liable. So, too, the action of defamation is a direct method of recovery for harm done to the reputation by the publication of scandalous charges of which the accusation of crime is one of the most obvious.

Both the actions for false arrest and for defamation allow protection for pecuniary interests where these have been

the action of libel or slander is the appropriate remedy, and would seem to be the only remedy."

"The foundation of this sort of action," said the South Carolina court, "is the wrong done to the plaintiff by the direct detention or imprisonment of his person." *Heyward v. Cuthbert*, 4 McCord 354 (S.C. 1827).

The New York Court of Appeals pointed out the fallacy in this position, permitted an action for malicious prosecution when a warrant had issued although not executed: "In opposition to what was said in the South Carolina case already referred to, the sole foundation of an action for malicious prosecution is not 'the wrong done to the plaintiff by the direct detention or imprisonment of his person.' In an action for false imprisonment that would be so. But in an action of the present type, the substantial injury for which damages are recovered and which serves as a basis for the action may be that inflicted upon the feelings, reputation and character by a false accusation as well as that caused by arrest and imprisonment. This element indeed is in many cases the gravamen of the action: (*Sheldon v. Carpenter*, 4 N.Y. 579, 580; *Woods v. Finnell*, 13 Bush (Ky.) Repts. 628; *Townsend on Slander*, §420; *Wheeler v. Hanson*, 161 Mass. 370; *Gundermann v. Buscher*, 73 Ill.App. 180; *Lawrence v. Hagerman*, 56 Ill. 68; *Davis v. Seeley*, 91 Iowa 583). But no matter how false and damaging the charge may be in a criminal proceeding upon which a warrant may be issued, damages for the injury caused thereby cannot under any ordinary circumstances be recovered in an action for libel or slander." *Halberstadt v. New York Life Ins. Co.*, 194 N.Y. 1, 7, 86 N.E. 801, 802, 21 L.R.A. (N.S.) 293, 296 (1909).

¹²"*False arrest.*" An arrest usually involves a confinement (see §112) and, in such case, the actor unless privileged is liable for 'false imprisonment' under the rules stated in §§35 to 45. An arrest, whether with or without a warrant, usually involves conduct which, unless privileged, is an 'assault' or 'battery' as well as a 'false imprisonment.' If an arrest is made by a mere touching without confinement, as in the execution of a valid warrant, the touching is offensive and, unless privileged, is a 'battery' under the rules stated in §§18 to 20. Where a privilege to arrest exists, it justifies not only the confinement but also any conduct which is reasonably necessary to effect the arrest." *RESTATEMENT, TORTS* (1934) §118, Comment b.

invaded as a legal result of the defendant's misconduct. The protection to this interest is the same as in the action for malicious prosecution; the same items may be included in recoverable damages.¹³ So, too, in all three actions, the interest in emotional tranquility receives protection. Mental anguish, humiliation and anxiety may be considered by the jury in arriving at its verdict in each case, and are thus included as parasitic damages in all three actions.¹⁴

3. Limits of Protection in the Three Actions

It thus appears that the action for malicious prosecution indirectly protects interests which receive direct protection by other rules of the law of torts. The necessity for this becomes apparent when we consider the limitation of actions for false imprisonment and defamation. Ordinarily one who intentionally causes the confinement of another by inducing a third person to do so is subject to the same liability as though he

¹³*Malicious prosecution*: *Stoecker v. Nathanson*, 5 Neb. Unoff. 435, 98 N.W. 1061, 70 L.R.A. 667 (1904) (withdrawal of offer of employment); *H. S. Leyman & Co. v. Short*, 214 Ky. 272, 283 S.W. 96 (1926) (loss of position); *Blunk v. Atchison, T. & S. F. R. R.*, 38 Fed. 311 (C.C.W.D.Mo. 1889) (expense incurred in defense of criminal prosecution); *Harr v. Ward*, 73 Ark. 437, 84 S.W. 496 (1904) (same); *Seidler v. Burns*, 86 Conn. 249, 85 Atl. 369, Ann.Cas. 1916C 266 (1912) (same); *Rowlands v. Samuel*, 11 Q.B. 39 (1847) (same); *Daughtry v. Blanket State Bank*, 41 S.W. (2d) 527 (Tex.Civ.App. 1931) (impairment of plaintiff's earning power).

False imprisonment: *Bailey v. Warner*, 118 Fed. 395 (C.C.A. 8th, 1902) (failure to obtain employment); *Allen v. Fromme*, 141 App.Div. 362, 126 N.Y.Supp. 520 (1st Dep't 1910) (loss of income to professional man); *Bolton v. Vellines*, 94 Va. 393, 26 S.E. 847, 64 Am.St.Rep. 737 (1897) (expense incident to obtaining release); *Foxall v. Barnett*, 2 E.&B. 928 (Q.B. 1853) (same).

Defamation: *Moore v. Meagher*, 1 Taunt. 39 (Ex. 1807) (loss of friend's hospitality of pecuniary value); *Dixon v. Smith*, 5 H.&N. 450 (Ex. 1860) (loss of employment). See RESTATEMENT, TORTS, (Tent.Draft No.12, 1935) §1016.

¹⁴*Malicious prosecution*: *Davis v. Seeley*, 91 Iowa 583, 60 N.W. 183, 51 Am.St.Rep. 556 (1894); *Barnes v. Culver*, 192 Ky. 10, 232 S.W. 39 (1921); *Redman v. Hudson*, 124 Ark. 26, 186 S.W. 312 (1916).

False arrest: *Goodell v. Tower*, 77 Vt. 61, 58 Atl. 790, 107 Am.St.Rep. 745 (1904); *Jones v. Hebdo*, 88 W.Va. 386, 106 S.E. 898 (1921).

Defamation: *McClintock v. McClure*, 171 Ky. 714, 188 S.W. 867, Ann. Cas. 1918E 96 (1916); *Rowe v. Myers*, 204 Mich. 374, 169 N.W. 823 (1918); *Evans v. McKay*, 212 S.W. 680 (Tex.Civ.App. 1919, writ of error dism'd); *Newby v. Times-Mirror Co.*, 46 Cal.App. 110, 188 Pac. 1008 (1920); *Sclar v. Resnick*, 192 Iowa 669, 185 N.W. 273 (1921).

himself had confined or imprisoned the other. This principle is applied where a citizen induces a police officer to arrest another without a warrant by direction or request or on a charge of crime which he knows to be without foundation.¹⁵ The officer is not liable if the arrest is lawful as it ordinarily will be when the crime charged is a felony, the citizen is apparently a credible person and there is apparently no reason to doubt him.¹⁶ The officer under such circumstances has reasonable ground to believe that the person accused has committed a felony and he may therefore arrest without a warrant. But while the officer is not liable, the citizen who thus causes the unjustified arrest is liable. An action of trespass will lie against him for the confinement. If the citizen does not follow up the arrest by making a formal charge of crime which results in the issuance of process or some prosecution, he is not liable for malicious prosecution.¹⁷ But the

¹⁵Taylor Bros. v. Hearn, 63 Tex.Civ.App. 333, 133 S.W. 301 (1911); Standard Oil Co. v. Davis, 208 Ala. 565, 94 So. 754 (1922); See also Grinnell v. Weston, 95 App.Div. 454, 88 N.Y.Supp. 781 (1st Dep't 1904); Robinson v. Van Auken, 190 Mass. 161, 76 N.E. 601 (1906).

"The inquiry is: (1) Whether or not the defendant or his agent directed, commanded, or in any way instigated the arrest; and (2) whether such conduct, if shown, was a material factor in causing the officer to make the arrest. Of course if the officer acts solely upon his own judgment and initiative, the defendant would not be responsible even though he had directed or requested such action, and even though he were actuated by malice or other improper motive." Standard Oil Co. v. Davis, 208 Ala. 565, 94 So. 754, 756 (1922).

¹⁶In Hogg v. Ward, 3 H.&N. 417, 422 (Ex. 1858), Bramwell, B. said: "If a person comes to a constable and says of another simpliciter 'I charge this man with felony,' that is a reasonable ground, and the constable ought to take the person charged into custody. But if from the circumstances it appears to be an unfounded charge, the constable is not only not bound to act upon it, but he is responsible for so doing." See also Blackburn, J., in Allen v. London & S. W. R. R., 11 Cox C. C. 621, 626 (Q.B. 1870), "where a respectable person tells him so, the policeman should believe it; but they should exercise a discretion, and see whether it is so or not." See also Van v. Pacific Coast Co., 120 Fed. 699 (C.C.D.Wash. 1903); Wilgus, *Arrest Without Warrant* (1924) 22 MICH. L. REV. 673, 696.

¹⁷Barry v. Third Ave. R. R., 51 App.Div. 385, 64 N.Y.Supp. 615 (1st Dep't 1900); Hackler v. Miller, 79 Neb. 206, 112 N.W. 303 (1907), *on rehearing*, 79 Neb. 209, 114 N.W. 274 (1907); Auerbach v. Freeman, 43 App.D.C. 176 (1915).

In Barry v. Third Ave. R. R., *supra*, the court said: "The mere fact of an illegal arrest and detention is not sufficient to maintain an action for malicious prosecution. The essential element of that action is that a judicial proceeding has been begun and carried on maliciously and

other's interests are much better protected by the action of trespass for the false arrest and no further protection is needed.

In several particulars, a private citizen here is under a much stricter liability for false arrest than he would be for malicious prosecution. In the first place, he takes the risk that a felony has in fact been committed; if it has not, he is liable without more.¹⁸ This, of course, is not the case in malicious prosecution where it is not enough to make the prosecutor liable to show either the innocence of the accused or that no crime had been committed. In the second place, even if a felony has been committed, the defendant in an action for false arrest, whether private citizen or officer, must have had reasonable grounds to believe that the accused probably committed it.¹⁹ The mere honesty of his belief and the propriety of his purpose and motive in causing the arrest will be no defense; his belief must be reasonable.^{19a} In malicious prosecution, however, the want of probable cause is not enough to make the prosecutor liable; he must be shown to have acted from an improper motive, *i.e.*, not to bring a supposed criminal to justice. If he acted for a proper purpose, the fact that he acted unreasonably will not make him liable.²⁰

Of course, if the citizen does not in fact induce the officer to make the arrest he is not liable at all. Thus, if he merely tells him such facts as he honestly believes to exist, neither requesting nor suggesting that the officer act, he is not responsible.²¹

without probable cause and has resulted in the discharge of the plaintiff. Unless the arrest is followed by some sort of a judicial proceeding there can be no malicious prosecution, and the plaintiff must seek his remedy in an action for false imprisonment." 51 App.Div. at 386, 64 N.Y.Supp. at 616.

¹⁸Burns v. Erben, 40 N.Y. 463 (1869); Walters v. Smith & Sons [1914], 1 K.B. 595. See Wilgus, *supra* note 16, at 690.

¹⁹Perryman v. Lister, L.R. 3 Ex. 197 (1868); People v. Kelvington, 104 Cal. 86, 37 Pac. 799 (1894); Grau v. Forge, 183 Ky. 521, 209 S.W. 369, 3 A.L.R. 642 (1919). Wilgus, *supra* note 16, at 695.

^{19a}Wilson v. Lapham, 196 Iowa 745, 195 N.W. 235 (1923); Larocque v. Dorsey, 299 Fed. 556 (C.C.A. 2d, 1924).

²⁰Seaboard Oil Co. v. Cunningham, 51 F. (2d) 321 (C.C.A. 5th, 1931), *cert. denied*, 284 U.S. 675 (1931); Jones v. Flaherty, 139 Minn. 97, 165 N.W. 963 (1917); Frampton v. Bieber, 204 S.W. 728 (Mo. 1918); Redgate v. Southern Pac. Co., 24 Cal.App. 573, 141 Pac. 1191 (1914); Sasse v. Rogers, 40 Ind.App. 197, 81 N.E. 590 (1907).

²¹Standard Oil Co. v. Davis, 208 Ala. 565, 94 So. 754 (1922); Klemm v. Adair, 189 Iowa 896, 179 N.W. 51 (1920); State *ex rel.* Fireman's

But this is also true in malicious prosecution. If one merely gives what he honestly believes to be accurate information to a prosecuting officer, neither requesting nor suggesting a prosecution, he is not liable for malicious prosecution for, within the meaning of the law, he has not procured the prosecution.²² In both actions, however, he is liable if he consciously misstates the facts, for he must, under such circumstances, act for the purpose of inducing action by the police or prosecuting officer.²³ He has procured the arrest in the one case and the prosecution in the other, by his fraudulent misstatements of fact. If he is honest, although unreasonably mistaken, he may well be regarded as not the responsible cause of the action taken by the officer if he does not otherwise influence his conduct.

Where the citizen procures the issuance of a warrant by a magistrate by making a formal charge of crime, he is not liable in an action for false imprisonment for the resulting arrest

Fund Ins. Co. v. Trimble, 294 Mo. 615, 242 S.W. 934 (1922); *Zinkfein v. W. T. Grant Co.*, 236 Mass. 228, 128 N.E. 24 (1920).

²²*American Surety Co. v. Pryor*, 217 Ala. 244, 115 So. 176, 179 (1927) (defendant's agent laid such facts as were within his knowledge before the prosecuting officer for "what they were worth," after which the officer conducted an investigation and procured an indictment of the plaintiff). The court said: "The general rule has been declared, based upon considerations of public policy and supported by many authorities, that, where a person gives information to the state's prosecuting officer charged by law with the duty of enforcing the criminal law, or the investigation and prosecution of probably committed crime, and that information tends to connect another with the commission of crime or the violation of the criminal law, and the informant states all the material facts bearing thereon within his knowledge, and leaves that officer to a discharge of his official duty and the exercise of his own judgment and responsibility . . . , the informant is not liable in an action for malicious prosecution under an indictment returned by that grand jury." See also *Western Oil Ref. Co. v. Glendenning*, 90 Ind.App. 631, 156 N.E. 182 (1927); *Atkinson v. Birmingham*, 44 R.I. 123, 116 Atl. 205, 36 A.L.R. 366 (1922); *Davies v. Kent*, 146 Iowa 228, 124 N.W. 1076 (1910); *Ryan v. Orient Ins. Co.*, 96 Vt. 291, 119 Atl. 423 (1922).

²³*Johnson v. Brady*, 77 Ind.App. 177, 126 N.E. 250 (1920) (defendant liable for malicious prosecution because he gave testimony resulting in an indictment of the plaintiff, and he at no time believed the accused to be guilty of the crime charged). *Lee v. Jones*, 44 R.I. 151, 116 Atl. 201 (1922); *Buchholz v. Glass*, 180 Wis. 527, 193 N.W. 392 (1923) (court said that defendant would be liable for false imprisonment if he gave information leading to the arrest without believing it to be true).

when the warrant is served.²⁴ Here, as in the former case, in fact he has "caused" the other's imprisonment but he has not done so within the meaning of the law. He has done so not by procuring action on his own behalf by a third person, but by setting in motion the machinery of the law against the other in the name and on behalf of the public. In the one case, the defendant acts as an individual; in the other as a member of the community. In the latter case, the official action of an important judicial officer has intervened between the conduct of the accuser and the arrest. The action for false imprisonment will not lie. The only protection available to the accused is the action for malicious prosecution which is much more difficult to maintain and therefore affords much less protection to his interests.

The opposing interests throw light upon these two situations. While the arrest of a citizen without a warrant may, in a particular case, be no more serious than his arrest on process, the privilege to make it is a far more serious matter. The requirements of process afford highly desirable safeguards. In the first place, the complaint is usually under oath. The possibility of prosecution for perjury presumably tends to sober reflection and to discourage thoughtless and ill-founded accusations. In the next place, the facts sworn to by the accuser are subjected to the critical examination of an officer more or less trained and versed in criminal law. If the facts as disclosed clearly indicate that no offense has been committed, no warrant will issue. Moreover, the collateral effects

²⁴See *Wilson v. Lapham*, 196 Iowa 745, 195 N.W. 235 (1923).

"One who institutes criminal proceedings against another intends to cause an arrest which is the normal incident of such proceedings. In such case, however, the actor is liable only if the confinement which the arrest involves is a part of the greater offense of instituting such proceedings without reasonable cause and for a purpose other than that for which the proceedings are provided. Therefore, unless the private prosecutor takes an active part in the service of a warrant issued in the criminal prosecution which he has instituted, his liability for the arrest is enforced only by the imposition of damages in aggravation of those recoverable for the malicious prosecution itself. This and the further fact that the private prosecution of public offenses is regarded as essential to the enforcement of the criminal law and, therefore, the private prosecutor is given the protection of an exceptionally favorable privilege, makes it necessary to state the rules which determine the liability for an arrest caused by the institution of criminal proceedings as part of the subject of malicious prosecution." *RESTATEMENT, TORTS*, §37, Comment b.

of arrest with and without a warrant are quite different. It is the generally recognized duty of a citizen to submit to a warrant regularly issued and properly served. The arrest, in such a case is lawful whatever may be the results or the liability of the persons responsible for it. So, too, it is the duty of the citizen to submit to a lawful arrest without a warrant, but the conditions which make it lawful or unlawful at once invite the judgment of the person sought to be arrested as to the propriety of the arrest and his privilege to resist it.²⁵ The potentialities for a breach of the peace in such a situation are enormous, whereas in the case of arrest under warrant they are obviously much less serious. While it is necessary and desirable that private citizens be encouraged to assist public officers in law enforcement, it is desirable that, wherever possible, they do so by first consulting public officials rather than causing summary arrest. Accordingly, the measure of protection given them is much greater if they follow the former method. A correspondingly less protection is given the interest of the person arrested.

In an action for defamation, the public interest in protecting those who materially assist in the administration of the criminal law so far offsets the interest in reputation alone, that no action can be maintained against one who brings a formal charge of crime against another by making a sworn complaint to a magistrate upon which a prosecution is based. Here again, the risk of prosecution for perjury is a deterrent. The privilege from liability for defamation is absolute and the immunity complete.²⁶ If the actor's conduct consist of an informal charge as in giving information to a prosecuting officer, the privilege is at least conditional, that is, protection depends upon the honesty of the informer and the reasonableness of his conduct.²⁷ The citizen to this extent is protected

²⁵Hughes v. Commonwealth, 19 Ky.LawRep. 497, 41 S.W. 294 (1897); Wolf v. State, 19 Ohio St. 248 (1869); State v. Randall, 118 S.C. 158, 110 S.E. 123 (1921).

²⁶Flynn v. Boglarsky, 164 Mich. 513, 129 N.W. 674, 32 L.R.A. (N.S.) 740 (1911), *on rehearing*, 178 Mich. 183, 144 N.W. 516 (1913). RESTATEMENT, TORTS (Tent.Draft No. 13, 1936) §1029.

²⁷There are several American authorities on the question whether a prosecuting witness or other person making an informal complaint to a prosecuting attorney or magistrate is absolutely privileged or whether he is protected only by a conditional privilege. Cases are about evenly divided. Such communications were held to be absolutely privileged in Vogel v. Gruaz, 110 U.S. 311, 4 Sup.Ct. 12, 28 L.Ed. 158 (1883); Gabriel

against the strict liability in defamation; and is subjected to the much less severe liability for malicious prosecution.²⁸

With reference to malicious prosecution and the social policy made effective thereby, Dean Green says: "There is no other cause of action which is more carefully guarded. Unfortunate defendants who are wrongfully subjected to the judicial process must bear that risk except in the most extreme cases. When such a defendant in turn becomes plaintiff he has an uphill fight to maintain his suit. The reasons are not hidden far beneath the surface. They are mostly administrative: (1) To encourage citizens to seek the protection of their interests and the interests of the community in the courts without fear of being themselves subjected to the hazards of litigation; (2) to question the integrity of the law's administration is a serious matter not to be lightly sustained; (3) it is desirable to let the settlement of the principal litigation settle all collateral matters."²⁹ Of these, it is submitted the first is the dominating factor. Only in the absolute privilege in defamation is greater protection given the citizen who assists in law enforcement. There, no action can be maintained at all. Even though the plaintiff is prepared to prove

v. McMullin, 127 Iowa 426, 103 N.W. 355 (1905); *Hott v. Yarbrough*, 112 Tex. 179, 245 S.W. 676 (1922); *Kidder v. Parkhurst*, 3 Allen 393 (Mass. 1862); *Wells v. Toogood*, 165 Mich. 677, 131 N.W. 124 (1911) *semble*. On the other hand, such communications were held to be only conditionally privileged in *Marshall v. Gunter*, 6 Rich.L. 419 (S.C. 1853); *Miller v. Nuckolls*, 77 Ark. 64, 91 S.W. 759, 4 L.R.A. (N.S.) 149 (1905); *Pecue v. West*, 233 N.Y. 316, 135 N.E. 515 (1921); *Hathaway v. Bruggink*, 168 Wis. 390, 170 N.W. 244 (1919); *Bunton v. Worley*, 4 Bibb. 38, 7 Am.Dec. 735 (Ky. 1815); *Nissen v. Cramer*, 104 N.C. 574, 10 S.E. 676, 6 L.R.A. 780 (1890). In several of the foregoing cases, the distinction was made between an informal verbal charge of crime and a formal complaint such as an affidavit, the former being conditionally privileged, the latter absolutely privileged.

²⁸The burden upon a plaintiff in an action for defamation is much less onerous than in an action for malicious prosecution. In the former, the plaintiff need prove neither the defendant's lack of proper motive (malice) nor his lack of belief in the truth of the charge or his lack of grounds for such belief. If these matters are important at all on liability, it is because the defamatory matter was published upon a conditionally privileged occasion as to which the burden of proof is on the defendant. In malicious prosecution, the plaintiff must establish all the aforementioned elements. So, too, in defamation, the plaintiff need not prove the charge false; the defendant must prove it true. In malicious prosecution, the plaintiff must at least prove that the proceeding terminated in his favor.

²⁹GREEN, *op. cit. supra* note 6, at 338.

that the defendant knew that the charge was utterly baseless and false and that he made it solely out of malevolence toward the plaintiff, no action for defamation will lie. The plaintiff's only recourse is in malicious prosecution which presents such heavy burdens to the plaintiff.

The policy for this extensive protection goes to the very root of civilization: to encourage resort to law. To be sure, it is not for the purpose of encouraging malicious and false charges. But the base and malevolent must receive protection that the good citizen may have it. There must be protection, as Dean Green has admirably put it, against "the hazards of litigation."³⁰ Indeed, there must be protection against the risk of even successful litigation and its attendant expense, inconvenience and anxiety. To afford the public such advantages is necessary in a society in which public authorities must rely so heavily upon the assistance and coöperation of the private citizen in the enforcement of the criminal law. But thus to protect the citizen who renders such assistance, less protection can be given to him who is falsely prosecuted for crime. It is to be noted, however, that once the plaintiff has surmounted the obstacles to a recovery, he will ordinarily be handsomely rewarded. Verdicts in actions for malicious prosecutions are notoriously liberal. This is proper, for ordinarily, several important interests have been invaded. The rigorous conditions to recovery demonstrate the outrageous character of the defendant's conduct and therefore justify punitive as well as compensatory damages.³¹

The policy, on the other hand, of discouraging and restricting summary arrest likewise touches a vital social interest, restriction of breaches of the peace and public disorder. This is especially true since the rise of the professional police³² makes dependence upon the private citizen much less necessary to the apprehension of criminals than it is to their prosecution.

³⁰*Ibid.* at 339.

³¹*Kershmer v. F. W. Woolworth Co.*, 133 Me. 519, 180 Atl. 322 (1935); *Walsh v. Segale*, 70 F. (2d) 698 (C.C.A. 2d, 1934); *Western Union Tel. Co. v. Thomasson*, 251 Fed. 833 (C.C.A. 4th, 1918).

³²See Hall, *Legal and Social Aspects of Arrest Without a Warrant* (1936) 49 HARV. L. REV. 566, 578.

4. Analytical Relations of Three Actions

It will be seen that while malicious prosecution is thought of as itself a tort, the function of the rules pertaining thereto is actually to afford a privilege or to qualify a privilege to engage in conduct which would ordinarily subject the actor to liability for false imprisonment or defamation or both. As to arrest, the action for malicious prosecution determines the conditions of a privilege, that is a qualified immunity; although the actor has brought about the imprisonment of the accused, he is protected if either of the conditions to his liability are wanting, viz., absence of probable cause and an improper purpose.³³ If the normal privilege of arrest without a warrant for a felony were applicable, the existence of either would make him liable. As to injury to reputation, the effect of the absolute privilege is mitigated; although the defamatory matter was published in the institution of a criminal proceeding and is therefore not actionable as defamation, it may make the publisher liable for malicious prosecution if the conditions to liability are present, viz., lack of probable cause and improper motive. The public interest in protecting those who assist in law enforcement justifies the immunity and liability thus created. The difficult questions in malicious prosecution involve excess or abuse of the privilege. Procedurally, however, there is an important difference between this and the usual privilege. The burden of proof is upon the plaintiff in malicious prosecution to establish the abuse of the privilege.³⁴ The issues which determine immunity are thus treated rather as issues which determine liability, and it is easier to think of malicious prosecution as a separate tort rather than a privilege. A somewhat similar situation exists as to "false arrest" which is commonly thought of as in itself a tort when, analytically, it merely means that the actor is not protected by the privilege to make a lawful arrest and is therefore, liable for false imprisonment or assault and

³³For purposes of the present contrast, the additional condition to liability for malicious prosecution is ignored, viz., termination of the proceeding in favor of the accused.

³⁴*Veid v. Roberts*, 200 Ala. 576, 76 So. 934 (1917); *Lee v. Levison*, 173 Cal. 166, 159 Pac. 438 (1916); *Pollack v. Staten Is. Rapid Transit Ry.*, 187 App.Div. 832 (2d Dep't 1919); *Goldstein v. Rau*, 147 Md. 6, 127 Atl. 488 (1925).

battery, or for both. Unlike malicious prosecution, however, the burden of proof on the issue of the privileged character of the actor's conduct is on the defendant rather than the plaintiff.³⁵

5. *The Absolute Defense Common to All Actions*

The relation of the actions for false imprisonment, defamation and malicious prosecution is further indicated by a complete defense that is common to all three torts. A guilty plaintiff can recover in none of the three actions. Thus, there can be no recovery for a false arrest, even though the defendant had no grounds whatever to suspect the plaintiff, if in fact, he luckily got the right man, that is if the plaintiff was actually guilty of the felony for which he was arrested.³⁶ So, too, although the defendant prosecuted the plaintiff maliciously and without proper cause, and the proceedings terminated in favor of the plaintiff, there can be no recovery for malicious prosecution if the plaintiff was guilty.³⁷ Thus, the defendant may actually retry the guilt of the person whom he unsuccessful-

³⁵Director General of Railroads v. Kastenbaum, 263 U.S. 25, 44 Sup. Ct. 52, 68 L.Ed. 146 (1923); Hobbs v. Illinois Cent. R. R., 182 Iowa 316, 165 N.W. 912 (1917); Keidel v. Baltimore & O. R. R., 281 Pa. 289, 126 Atl. 770 (1924); Slifer v. Yorath, 52 Mont. 129, 155 Pac. 1113 (1916).

³⁶Hushaw v. Dunn, 62 Colo. 109, 160 Pac. 1037 (1916); Williams v. Brooks, 95 Wash. 410, 163 Pac. 925 (1917); Waddle v. Wilson, 164 Ky. 228, 175 S. W. 382 (1915); Griffin v. Russell, 161 Ky. 471, 170 S.W. 1192 (1914); Erie R. R. v. Reigherd, 166 Fed. 247 (C.C.A. 6th, 1909).

Authority adduced for the contrary rule will usually be found to consist of criminal prosecutions in which evidence of the guilt of the accused is held to be inadmissible because illegally obtained. This is a matter obviously quite different from offering admissible evidence (*e.g.*, a conviction of crime) as a defense in a civil action for false arrest. So, too, the fact that courts discuss the reasonableness of the arrester's belief in guilt while ignoring the fact of the guilt of the accused is not persuasive if the consideration of the first question results in favor of the arrester. But see Waite, *Some Inadequacies in the Law of Arrest* (1930) 29 MICH. L. REV. 448 and cases discussed therein.

The plaintiff's guilt of the very kind of offense for which he was arrested, committed at some previous time, however, will not be a defense. *Walters v. Smith* [1914], 1 K.B. 595.

³⁷Whipple v. Gorsuch, 82 Ark. 252, 101 S.W. 735, 10 L.R.A. (N.S.) 1133 (1907); Indianapolis Traction & Terminal Co. v. Henby, 178 Ind. 239, 97 N.E. 313 (1912); Barton v. Camden, 147 Va. 263, 137 S.E. 465 (1927); White v. International Text Book Co., 156 Iowa 210, 136 N.W. 121, 42 L.R.A. (N.S.) 346 (1912), *on rehearing*, 164 Iowa 693, 146 N.W. 829 (1914).

fully prosecuted, and in a civil action.³⁸ This at first seems inconsistent with the rule that the plaintiff is not entitled to the same opportunity. If he has been convicted of the crime, he cannot succeed as a plaintiff although he is prepared to prove that he was in fact not guilty and was improperly convicted.³⁹ This inconsistency becomes less apparent, however, when we remember that a verdict of acquittal is merely a judicial record that the state had failed to sustain the very heavy burden which rests upon it in a criminal prosecution, to convince beyond a reasonable doubt that the accused was guilty of the offense charged. To be sure, the accused cannot again be tried for the same offense. Public policy requires that one need defend against the same charge but once in a criminal prosecution. It does not follow, however, that the question of the guilt of the accused cannot be raised in a civil proceeding in which he seeks damages for the prosecution. Although the evidence of his guilt might not have been sufficient to justify a jury in finding him guilty and subjecting him to punishment, it may well be sufficient to estop him from claiming damages for the prosecution. Thus, evidence of guilt may make it more probable that the accused was guilty of the crime than that he was innocent and still fall measurably short of removing all reasonable doubt of his guilt. In such a situation, the accused will be acquitted in a criminal prosecution. Yet, in the subsequent action for malicious prosecution, he will lose, because the defendant can convince the jury by a preponderance of the evidence that the plaintiff was guilty in spite of the failure of the state to establish such guilt beyond a reasonable doubt.

On the other hand, if the accused has been found guilty in the criminal proceeding, he will not be permitted to attack the judgment collaterally in a civil proceeding. His conviction in the criminal case indicates that the state had established

³⁸White v. International Text Book Co., 156 Iowa 210, 136 N.W. 121, 42 L.R.A. (N.S.) 346 (1912), *on rehearing*, 164 Iowa 693, 146 N. W. 829 (1914).

³⁹Keithley v. Stevens, 142 Ill.App. 406 (1909), *aff'd*, 238 Ill. 199, 87 N.E. 375 (1909) (holding that conviction was a bar to suit by plaintiff, even though the conviction were obtained by false testimony); Bacon v. Towne, 4 Cush. 217 (Mass. 1839); Basebe v. Matthews, L.R. 2 C.P. 684 (1867) (demurrer sustained to complaint in which plaintiff alleged that defendant has procured his prior conviction by false and malicious statements which induced a magistrate wrongfully to convict him).

his guilt by the severest of tests—conviction beyond a reasonable doubt. It would be bad policy to permit a subsequent challenge of a matter settled with such certainty. This is particularly true when the attack is made in the little favored action of malicious prosecution. Protection to private citizens whose aid is necessary in the enforcement of criminal justice would be wholly inadequate if it were subject to defeasance, after a successful prosecution, by the ability of the accused to convince a jury merely by the weight of evidence that he had been improperly convicted.

The rule, applicable alike in false arrest and malicious prosecution, that the plaintiff can under no circumstances recover if he was guilty of the offense for which he was arrested or with which he was charged is the counterpart of the rule in defamation that the truth of the defamatory matter is a complete defense.⁴⁰ Here again is the complete lack of merit of the particular plaintiff. But more important is the policy, immunity as a premium for getting the right man or telling the right thing. The defendant, in all of these cases is *right*. Regardless of the general questionable or even unjustifiable character of his conduct, the defendant has done for society a good turn in the particular case. He took the risk of arresting or prosecuting an innocent person or making a false statement; but he was successful. Thus, although he arrests upon no reasonable grounds whatever or prosecutes not only without cause but even maliciously or states what he believes, even upon reasonable grounds, to be a lie, if it so turns out that he arrests or prosecutes a guilty person or unwittingly tells the truth, he is not liable. The law is practical business. No need for going into such questions as reasonable or probable cause or such subjective matters as motive or purpose. If the end accomplished does not justify the means, the success of the defendant's conduct at least justifies the law in ignoring the means of its accomplishment. The policy of apprehending and prosecuting offenders against the criminal law and of obtaining accurate information about persons is a strong one—so strong that he who purports to advance these policies takes, at most, only the risk of failure.

⁴⁰Campbell v. Spottiswoode, 3 B.&S. 769 (Q.B. 1863); Florida Publ. Co. v. Lee, 76 Fla. 405, 80 So. 245 (1918); Plummer v. Commercial Tribune Publishing Co., 208 Ky. 210, 270 S.W. 793 (1925); Chavez v. Times-Mirror Co., 185 Cal. 20, 195 Pac. 666 (1921).

The administration of these principles in the three actions is also significant. In the false arrest cases, it is frequently stated that the offense for which the accused is arrested must be the very offense which has been committed.⁴¹ This is in fact modified, however, by the qualification that the actor is not held to the niceties of the legal technicalities of the criminal law and if the arrest is made for an offense which is substantially similar to that which has been committed, the arrest is privileged if there were reasonable grounds to believe the plaintiff guilty.⁴² He cannot defend by showing that the defendant committed the same offense on some previous occasion, but he is not held liable because he did not accurately name the offense which was committed on the occasion in question. So, too, if there is guilt or probable cause for belief in guilt of an offense which is substantially similar to that for which the plaintiff is prosecuted, the conditions to liability for malicious prosecution are lacking.⁴³ The same policy is observable in the application of the defense of truth in defamation. Although it is necessary that the defendant, to make good his defense, must prove the truth of the very defamatory imputation contained in the publication complained of, substantial truth is enough.⁴⁴ He cannot defend by proving the

⁴¹See *Walters v. Smith* [1914], 1 K.B. 595; and *Snead v. Bonnoil*, 166 N.Y. 325, 59 N.E. 899 (1901). See Jerome Hall, *supra* note 32, at 577.

⁴²*Adams v. Schwartz*, 137 App.Div. 230, 122 N.Y.Supp. 41 (1st Dep't 1910) (arrested for breach of peace, found guilty of a trespass; defendant not liable for false arrest); also see *Van v. Pacific Coast Co.*, 120 Fed. 699 (C.C.D.Wash. 1903).

The incidents for which the arrest is made, however, must in fact have transpired. *Walters v. Smith* [1914], 1 K.B. 595, in which the plaintiff had been arrested for acts which neither he nor anyone else had committed. The plaintiff recovered although other similar acts had been committed by the plaintiff himself at previous times.

⁴³*Benford v. Bledsoe*, 26 Ga.App. 361, 106 S.E. 202 (1921); *Steimling v. Bower*, 156 Pa. 408, 27 Atl. 299 (1893).

⁴⁴*State Journal Co. v. Redding*, 175 Ky. 388, 194 S.W. 301, Ann.Cas. 1918C 332 (1917); *Plummer v. Commercial Tribune Publishing Co.*, 208 Ky. 210, 270 S.W. 793 (1925); *Florida Publishing Co. v. Lee*, 76 Fla. 405, 80 So. 245 (1918). RESTATEMENT, TORTS (Tent. Draft No. 13, 1936), §1024A, Comment e. BOWER, ACTIONABLE DEFAMATION (1923), Art. 26, Rule 2.

truth of some other defamatory charge, even though more disparaging to the plaintiff's reputation than the one made;⁴⁵ but he is not required to prove, the literal truth of the precise language employed. If there are no material discrepancies between the plaintiff's proved delinquency and the defendant's report thereof, there is no liability.

6. *The Reasonableness of Defendant's Conduct in
All Three Actions*

The conditions to immunity in the actions for false imprisonment, defamation and for malicious prosecution, bear comparison in another respect. On arrest without a warrant, the defendant is not liable if he reasonably believed that the person arrested was guilty of the felony for which he is arrested if the felony had actually been committed. In malicious prosecution the defendant is not liable if he had probable cause for the prosecution. Probable cause requires actual belief in the other's guilt.⁴⁶ Even though the circumstances point reasonably to the other's guilt, there is no probable cause if the prosecutor actually believes him innocent notwithstanding the indications of guilt. The same is true in false arrest. The defendant must have reasonable grounds to believe in guilt, but he must also believe.⁴⁷ The qualified privilege in action of defamation which protects the citizen who imparts information to a law enforcement officer discloses similar conditions. He must not only have reasonable grounds for belief

⁴⁵*Martinoff v. Jackson News Publishing Co.*, 226 Mich. 233, 197 N.W. 576 (1924) (proof of larceny will not justify a defamatory charge of another crime).

Also see language in *Herald News Co. v. Wilkinson*, 239 S.W. 294 (Tex.Civ.App. 1922, writ of error dismissed).

This is analogous to the rule that in an action for false arrest, the defendant may not offer the plaintiff's guilt of some other offense committed on a previous occasion. See *Walters v. Smith* [1914], 1 K.B. 595.

⁴⁶*Vorhes v. Buchwald*, 137 Iowa 721, 112 N.W. 1105 (1907); *Schmidt v. Medical Society of New York County*, 142 App.Div. 635, 127 N.Y.Supp. 365 (1st Dep't 1911), *appeal dismissed*, 206 N.Y. 730, 100 N.E. 1133 (1912); *Callahan v. Kelso*, 170 Mo.App. 338, 156 S.W. 716 (1913); *Thienes v. Francis*, 69 Ore. 165, 138 Pac. 490 (1914); *Jackson v. Bell*, 5 S.D. 257, 58 N.W. 671 (1894); *Burke v. Watts*, 188 Cal. 118, 204 Pac. 578 (1922).

⁴⁷*Illinois Cent. R. R. v. Dennington*, 172 Ky. 325, 189 S.W. 217 (1916).

in the truth of the defamatory charges which he thus makes but he must also entertain the belief.⁴⁸

It is probable that the conditions outlined in the foregoing paragraph are not quite accurate or that they are accurate only in certain senses of words. In most situations, courts couch the rules in terms of "belief" and "reasonable belief." Belief, of course, is a word the meaning of which is elusive. It is extremely doubtful if, as used in this connection, it means a state of mind which it is proper to describe as complete conviction. It probably does not indicate that conviction described in criminal cases as "beyond a reasonable doubt." On the other hand, it seems likely that it means no more than that degree of mental certainty which leans toward the probabilities. Thus, one "believes" another to be guilty of an offense, within the meaning of the rule, if he believes that it is more, rather than less, probable that the other committed it. It is perhaps an understatement to describe it as merely a suspicion although courts have described it as a "reasonable suspicion,"⁴⁹ but it most surely is not that highly comfortable mental state which, if the belief corresponds with external fact, we characterize as knowledge.

"Belief" in some such more or less accurate sense, however, there must be to establish immunity in all cases of arrest for felony without a warrant, malicious prosecution of a criminal charge and defamation by publishing a charge of crime by giving information to an officer charged with prosecution for crime. The policy is clear and is uniform in all these cases and the rules of law are consistent and adequate to give effect thereto. It is thought that good social engineering requires this rule as a balance between the public interest in the administration of the criminal law and the protection of the citizen from unwarranted charges. This policy is emphasized by contrast with that made effective in cases involving the privilege to publish defamatory matter for the protection of the private interest of the person to whom the communication

⁴⁸Taylor v. Chambers, 2 Ga.App. 178, 58 S.E. 369 (1907); Joseph v. Baars, 142 Wis. 390, 125 N.W. 913, 135 Am.St.Rep. 1076 (1910).

⁴⁹See Hanchey v. Brunson, 175 Ala. 236, 56 So. 971, Ann.Cas. 1914C, 804 (1911); Johnson v. Southern Pac. Co., 157 Cal. 333, 107 Pac. 611 (1910); Frank Parmelee Co. v. Griffin, 136 Ill.App. 307 (1908), *aff'd*, 232 Ill. 503, 83 N.E. 1041 (1908); Moneyweight Scale Co. v. McCormick, 109 Md. 170, 72 Atl. 537 (1909).

is made. Here actual belief in the truth of the scandal is unnecessary in many cases.⁵⁰ It may well be enough that the defendant believed only in the possible truth of the matter or, indeed, that there was no possible truth in the defamatory rumor. Some situations there are in which the protection of the third person may require knowledge of a rumor about his servants or associates although both he and his informer know that the rumor is unfounded. In such cases, it is reasonable to impart a defamatory rumor which the informer may have reason to believe untrue, provided, of course, that he imparts it merely as rumor and not as fact and provided further that he does not indicate that he himself believes it when he does not.

What the law seeks in all these cases is to permit with immunity, but to restrict to on pain of liability, conduct which is reasonable in view of the competing interests. Only in the case of the absolute privilege to defame another in the formal institution of criminal proceedings in a complaint under oath is the unreasonable character of the defendant's conduct immaterial. His conduct is subject to scrutiny, however, in an action for malicious prosecution if the other conditions to liability in that action exist.

7. Reasonable Mistake of Fact and of Law in All Three Actions

Reasonable belief in "the guilt of an accused" carries three meanings. First, it implies belief that certain acts have been committed; second, that the accused has done them; third, that these acts, in law, constitute a criminal offense. As to the

⁵⁰See *Clark v. Molyneux*, 3 Q.B.D. 237 (1877); *Doane v. Grew*, 220 Mass. 171, 107 N.E. 620, L.R.A. 1915C, 774 (1915); *International & G. N. R. R. v. Edmundson*, 222 S.W. 181 (Tex.Comm.App. 1920); *Barry v. McCollom*, 81 Conn. 293, 70 Atl. 1035, 129 Am.St.Rep. 215 (1908); *British R. T. & E. Co. v. C. R. C. Co., Ltd.* [1922], 2 K.B. 260.

"A person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it." *Bramwell, L. J.*, in *Clark v. Molyneux*, *supra* at 224.

"There may be situations where a man is justified in reporting what he has heard, although he does not believe it himself. He might be protected in repeating current rumors if he so limits them." *Hallen, Character of Belief Necessary for the Conditional Privilege in Defamation* (1931) 25 ILL. L. REV. 865, 875.

second, both in false arrest and malicious prosecution, although there must be reasonable belief, such belief is enough. Belief upon reasonable grounds that the plaintiff was the person who committed acts which constitute a criminal offense satisfies the requirements in both actions in this respect. The defendant is excused for a mistaken belief if it is reasonable, but he is excused.⁵¹ As to the first and third requirement, however, different rules are applicable.

In false arrest, if the defendant is a private citizen, neither his belief nor its reasonableness is important as to the actual commission of the acts for which the arrest is made. The usual formula at common law was that the felony for which the arrest was made must actually have been committed. The citizen takes the risk of a mistake of fact as to the actual happening of the events which he believes constitute a crime.⁵² If no such event has taken place he is liable although, had it occurred as he reasonably believed, it would constitute a felony. Moreover, identical facts on a different occasion will not do. The very incident for which the arrest is made must have been committed although, as already indicated, it need not be the very felony *in law* provided the facts for which the arrest was made amounted to a closely similar felony.⁵³ This, it seems, is not the case in malicious prosecution. Probable cause requires merely reasonable belief both as to the factual situation and the other's connection with it.⁵⁴ The prosecutor does not take the risk of a mistake of fact if the mistake is honest and reasonable. Here is an important difference in the protection given the private citizen in the two classes of cases. Much more latitude is allowed the prosecutor

⁵¹*Malicious prosecution*: *F. W. Woolworth Co. v. Connors*, 142 Tenn. 678, 222 S.W. 1053 (1920); *McHugh v. Ridgell*, 105 Neb. 212, 180 N.W. 75 (1920); *MacCauley v. Theodore B. Starr*, 194 App.Div. 643, 186 N.Y. Supp. 197 (1st Dep't 1921), *aff'd*, 233 N.Y. 601, 135 N.E. 935 (1922).

False imprisonment: *White v. Jansen*, 81 Wash. 435, 142 Pac. 1140 (1914); *Kittredge v. Frothingham*, 114 Me. 537, 96 Atl. 1063 (1916).

⁵²*Walters v. Smith* [1914], 1 K.B. 595. Also see *Allen v. Wright*, 8 Car.&P. 522 (C.P. 1838); *Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005 (1900); *Maliniemi v. Gronlund*, 92 Mich. 222, 52 N.W. 627, 31 Am. St. 576 (1892). *Wilgus*, *supra* note 16, at 691.

⁵³See cases cited note 42, *supra*.

⁵⁴Thus, the defendant is protected if he honestly and reasonably believes that certain criminal acts were committed and that the plaintiff committed them.

than the arrester. The latter acts at his peril as to the existence of the facts which he thinks exist; the former does not.

As to the acts committed or reasonably believed to have been committed constituting a felony and the felony for which the other is arrested or prosecuted, there seems to exist a similar difference. It is apparently the rule in false arrest that the citizen also takes the risk of innocent mistake here. The formula is broad enough to require this result. "A felony must have been committed." Thus, not only must the facts have transpired, as charged, but such facts must in law constitute a felony.⁵⁵ A felony, in law as well as in fact must have been committed. A mistake on either issue is fatal, no matter how excusable the error. In this respect the private citizen is held to the technicalities of the criminal law on important matters.⁵⁶ Although he is allowed the immaterial mistake of ascribing the wrong name to the felony, he is not excused for the material error, even though reasonable, of mistaking for felony that which is not such. If he mistakes a close case of self-defense for a deadly assault or if he treats that which is only a misdemeanor as a felony, he forfeits immunity.⁵⁷ The rule is harsh, but it is the price of this particular type of public service.

⁵⁵Williamson v. Glen Alum Coal Co., 72 W.Va., 288, 78 S.E. 94 (1913); Scharsmith v. Knapp, 164 N.Y.Supp. 578 (1917); Robinson v. Van Auken, 190 Mass. 161, 76 N.E. 601 (1906).

⁵⁶Even a peace officer is generally not protected when he makes a mistake of law unless the mistake consists of action under a statute which is subsequently declared unconstitutional. See RESTATEMENT, TORTS, §121, Comment i: "Officer's mistake of law and fact. A peace officer making an arrest without a warrant is protected in every case where he acts under a reasonable mistake as to the existence of facts which, under the rule stated in this Section justify an arrest without a warrant. On the other hand, no protection is given to a peace officer who, however reasonably, acts under a mistake of law other than a mistake as to the validity of a statute or ordinance. Thus, an officer is not privileged to arrest another whom he reasonably suspects of having committed an act which the officer, through a mistake of law reasonable in one of his position, believes to be a common law felony. So too, a peace officer is not privileged to arrest another whom he reasonably suspects of having committed an act which the officer, through a mistaken construction of a statute, believes to have been made a felony by such statute. And this is so although the reasonable character of the officer's mistake is proved by the fact that at the time of the arrest the statute is generally understood to make such an act a felony and is not judicially construed to the contrary until after the arrest is made."

⁵⁷See note 55, *supra*.

The manner of treatment of this problem in malicious prosecution is not uniform. Some decisions follow the analogy of false arrest and hold the prosecutor responsible for mistakes of law. A reasonably mistaken belief that particular conduct constitutes a crime does not establish the existence of probable cause.⁵⁸ Other decisions extended protection to include such mistakes.⁵⁹ Even in jurisdictions which follow the narrow rule, however, the severity of the technicality is mitigated by other rules which in effect allow a much broader latitude of action to the prosecutor than to the arrester. A mistake of law is not charged to the prosecutor, even though it is an absurd one, if, believing the other guilty, he prosecutes him pursuant to advice of a reputable practicing lawyer.⁶⁰ So, too,

⁵⁸Wadkins v. Digman, 82 W.Va. 623, 96 S.E. 1016 (1918); Dean v. Kochendorfer, 237 N.Y. 384, 143 N.E. 229 (1924); Hazzard v. Flury, 120 N.Y. 223, 24 N.E. 194 (1890); Turner v. O'Brien, 5 Neb. 542 (1877); Parli v. Reed, 30 Kan. 534, 2 Pac. 635 (1883). In some of these cases a finding that the mistake was unreasonable even for a layman might have been justified.

⁵⁹Whipple v. Gorsuch, 82 Ark. 252, 101 S.W. 735, 10 L.R.A. (N.S.) 1133 (1907); Bennett v. Ware, 4 Ga.App. 293, 61 S.E. 546 (1908); Hébert v. Hogan, 167 So. 430 (La. 1936); Dunlap v. New Zealand, etc., Ins. Co., 109 Cal. 365, 42 Pac. 29 (1895); Franklin v. Irvine, 52 Cal. App. 286, 198 Pac. 647 (1921); Cobbe v. State Journal Co., 77 Neb. 626, 113 N.W. 224 (1907); Birdsall v. Smith, 158 Mich. 390, 122 N.W. 626 (1909). The latter two cases involved a mistake of law by reason of the unconstitutionality of a statute.

In Dunlap v. New Zealand, *supra*, it was said: "The facts within his (defendant's) knowledge may not in point of law constitute a crime, but, if they are of such a character as to induce in the mind of a reasonable man the honest belief that a crime has been committed, he is justified in seeking to have the crime punished." 109 Cal. at 369.

⁶⁰Goad v. Brown, 73 Okla. 241, 175 Pac. 767 (1918); *Ex parte Kemp*, 202 Ala. 425, 80 So. 809 (1919); Allen v. Codman, 139 Mass. 136, 29 N.E. 537 (1906); Baker v. Larson, 138 Kan. 200, 25 P. (2d) 375 (1933); Price Merc. Co. v. Cuilla, 100 Ark. 316, 141 S.W. 194 (1911); Jones v. Flaherty, 139 Minn. 97, 165 N.W. 963 (1917); Muir v. Hankele, 273 Pa. 231, 116 Atl. 822 (1922); Main v. Healy, 100 Wash. 253, 170 Pac. 570 (1918).

The prosecutor must, of course, believe in the other's guilt. If he does not, he is not protected by advice of counsel. *Burke v. Watts*, 188 Cal. 118, 204 Pac. 578 (1922); *Center v. Spring*, 2 Iowa 393 (1882); *Jackson v. Bell*, 5 S.D. 257, 58 N.W. 671 (1894); *Gurden v. Stevens*, 146 Mich. 489, 109 N.W. 851 (1906); *Cole v. Curtis*, 16 Minn. 182 (1884). This is sometimes expressed by the formula that the prosecutor must "in good faith" have acted on advice of counsel. See *Aland v. Pyle*, 263 Pa. 254, 106 Atl. 349 (1925); *Indianapolis Tr. Co. v. Henby*, 178 Ind.

even in the absence of such precautions, he is excused if the reasonableness of his mistaken view of the law is indicated by a similar mistake on the part of the trial judge and jury at the criminal trial. A conviction, although reversed on appeal, is conclusive on the issue of probable cause.⁶¹

In defamation, of course, there has never been any question as to the responsibility for innocent mistakes either as to fact or law. The citizen who communicates his reasonable belief to a law enforcement officer or one reasonably believed to be such,⁶² for a proper purpose, is protected whether he is mistaken in any or all particulars. The policy which permits this broad latitude here is quite understandable. In the first place the harm threatened to the person defamed is not so imminent. It is unlikely that he will be subjected either to arrest or criminal proceedings unless further investigation by the prosecuting officer discloses grounds therefor, and this investigation

239, 97 N.E. 313 (1912); *White v. International Textbook Co.*, 144 Iowa 92, 121 N.W. 1104 (1909).

The reason for this qualification to the immunity of advice of counsel is clear. The principal consideration for the immunity is to permit the citizen to rely upon the judgment of the lawyer as to technical questions, i.e., whether acts reasonably believed by the citizen to have been committed constitute a violation of the criminal law. If the prosecutor does not honestly believe that they have been committed or that the other committed them, it is immaterial whether they constitute a crime and the advice of counsel loses its significance. It is to be noted that advice of counsel is no defense in an action for false arrest. *Wilson v. Lapham*, 196 Iowa 745, 195 N.W. 235 (1923).

⁶¹*Crescent City Livestock Landing & S. H. Co. v. Butchers' Union*, 120 U.S. 141, 7 Sup.Ct. 472, 30 L.Ed. 614 (1887); *Adams v. Bicknell*, 126 Ind. 210, 25 N.E. 804, 22 Am.St.Rep. 576 (1890); *Hartshorn v. Smith*, 104 Ga. 235, 30 S.E. 666 (1898); *Duerr v. Kentucky, etc., Bridge Co.*, 132 Ky. 228, 116 S.W. 325 (1909); *Sidelinger v. Trowbridge*, 113 Me. 537, 95 Atl. 213 (1915); *Desmond v. Fawcett*, 226 Mass. 100, 115 N.E. 280 (1917).

In some jurisdictions, a conviction is said to be only a "prima facie" case of probable cause. *McElroy v. Catholic Press*, 254 Ill. 290, 98 N.E. 527 (1912); *Miller v. Runkle*, 137 Iowa 155, 114 N.W. 611 (1908); *Nehr v. Dobbs*, 47 Neb. 863, 66 N.W. 864 (1896).

⁶²In England, it seems that the privilege to communicate facts reasonably believed to be true to a law enforcement or other governmental officer exists only if the person to whom the communication is made is in fact such an officer with power to act in the particular case. If the citizen makes ever so reasonable a mistake as to the identity of the officer or the extent of his authority, the privilege is lost. *Hebditch v. MacIlwaine*, 2 Q.B.D. 54 (C.A. 1894). This is not the law in the United States. See *Harper, Privileged Defamation* (1936) 22 VA. L. REV. 642, 649, and cases cited.

is likely to lead to discovery of the error and thus remove the suspicion of the other's guilt. The harm to the other's reputation is not likely to prove serious unless further proceedings take place, because of the limited scope of the publication. The privilege, of course, is defeated if the defendant unnecessarily communicates the information to persons other than the prosecuting officer or one believed reasonably to be such an officer.⁶³

8. *Consistent Policy in Oscillating Protection of Interests*

From these comparisons and contrasts, can be observed the relationships among the three common tort remedies available against one who directly or indirectly participates or attempts to participate in the administration and enforcement of the criminal law. Here, it is obvious, are opposed two general types of interests—the interest of the individual and the public interest in law enforcement. The process of balancing the two, however, requires recognition of numerous shadings and gradations in the social value of various types of human activity. First the balance will tip one way, then the other. This calls for nice distinctions depending in part upon the manner in which the citizen invokes or attempts to invoke official action and its probable effect on the plaintiff as well as its utility as a means of enforcing the criminal law. As the advantages to the public and the harm to the person affected compare, so a policy properly to adjust the interests involved demands added legal protection to the one or the other party.

The technicalities of the three actions considered appear to afford the desired elasticity to a remarkable degree. The least protection given the citizen assisting in law enforcement is in false arrest, considerably more in malicious prosecution, and the most still in defamation if the defendant has formally instituted the proceedings. The proper appraisal of the interests in the various situations to which these actions are applicable seem to justify the differences in liability. The actionable character of the actor's conduct as amounting to malicious prosecution in one respect begins where, in false arrest it terminates and in defamation there is indefeasible immunity.

⁶³*Stevens v. Haering's Groceterium*, 125 Wash. 404, 216 Pac. 870 (1923).

The actions are to this extent complementary. Any of the three actions, once maintainable, affords recovery for harm to the same interests as indicated by the rules governing recoverable upon ample evidence that there is here a "law of tort" rather damages. As applied to this particular problem, it can be said than three derivities from as many forms of action at common law which disclose no consistent policy in interest protection. This is not entirely an accident of legal history. Although the three actions derive from different sources, it appears that the courts have fashioned each of them with a view to the limitations of the others so that all three disclose a body of rules that are orderly and scientific in their relation to each other and to the function which they perform.

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